RECORD AND BRIEFS

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No. 16-111

IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.,
AND JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION,
CHARLIE CRAIG, AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law[1] (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the United States Constitution as interpreted strictly according to the intent of its Framers.

The Foundation believes marriage and the family are the most fundamental institutions of society, and that freedom of religion and freedom of expression are among the most fundamental rights guaranteed by the First Amendment to the United States Constitution. As such, the Foundation believes these rights should be accorded strict scrutiny, especially when asserted in tandem as a hybrid right. Those most fundamental rights should not be abridged to accommodate a claimed state interest in protecting same-sex marriage which is not explicitly granted by any provision of the Constitution and which was first recognized by this Court only two years ago.

Furthermore, the Foundation believes the courts and the State of Colorado must not communicate a "message of exclusion" to those members of society whose sincere religious beliefs prohibit participation in same-sex marriage.

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

"At common law, only innkeepers and common carriers had an obligation to serve all comers regardless of race; other businesses generally had the right, as property owners, to exclude anyone for any reason."[2] The broad coverage of modern public accommodations laws "directly opposes a right to exclude that may arise from a variety of constitutional or 'natural law' sources."[3] Still, as one scholar has observed, "[t]he rise of equal access rights nevertheless does not mandate the fall of individual liberties."[4]

In this case the right of equal access to places of business open to the public is in conflict with the freedom of expression and the religious conscience of a business owner who offers creative services. This apparent clash of liberties is at the heart of this case. The rights of speech and religion that are under attack from a Colorado anti-discrimination statute are the very rights that this Court has historically afforded the highest degree of protection. The original settlers of this country left their native lands to escape religious persecution. James Madison memorialized their creed: "The Religion then of every man must be left to the conviction and conscience of

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[2] Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations*, 72 N.Y.U.L. Rev. 1243, 1249 n.29 (1997).

[3] Pamela Griffin, *Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law*, 16 Pac. L.J. 1047, 1047 (1985).

[4] *Id.* at 1048.

every man; and it is the right of every man to exercise it as these may dictate." *Memorial and Remonstrance against Religious Assessments* (1785), Founders Online, National Archives.[5]

As Justice Brandeis stated nearly a century ago, the Founders of this country knew "that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate, that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies ...." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The right of access to public accommodations must be construed narrowly when it comes up against the constitutional rights of free exercise of religion, freedom of speech, the ownership and use of property, liberty of contract, and freedom from involuntary servitude. The current case embodies this dilemma.

ARGUMENT

I. The Colorado Court of Appeals ("CCA") fundamentally erred in elevating a right not found in the Constitution (same-sex marriage) above the most basic rights expressly set forth therein.

The Free Exercise Clause is the "favored child" of the First Amendment. Leo Pfeffer, *Church, State and*

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[5] http://founders.archives.gov/documents/Madison/01-08-02-0163.

Freedom 74 (1953). The First Amendment religion clauses embody two basic principles: separation (the Establishment Clause) and voluntarism (the Free Exercise Clause). Lawrence H. Tribe, *American Constitutional Law* § 14-3 (2d ed. 1978). "Of the two principles, voluntarism may be the more fundamental," and therefore, "the free exercise principle should be dominant in any conflict with the anti-establishment principle." *Id.* The principle of voluntarism is central to the case at hand, for the CCA's ruling has the effect of compelling Masterpiece Cake Shop to violate basic religious beliefs that are protected by the Free Exercise Clause of the first Amendment.

This Court has often affirmed the importance and preeminence of the Bill of Rights and, specifically, the First Amendment. "[P]rotecting the freedom to believe, express, and exercise a religion [is] the mission of the Free Exercise Clause" *Bowen v. Roy*, 476 U.S. 693, 700 (1986). As this Court said in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943),

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Furthermore, in this case Phillips[6] is not challenging the right to same-sex marriage, trying to prevent the wedding from occurring, or excluding respondents from general patronage at his shop. He merely objected, because of his religious and moral convictions, to participating in the ceremony by preparing a customized wedding cake. A wedding cake is not a legal requirement to get married nor is it a universal fixture at every wedding.[7] And there has been no showing that the same-sex couple had any difficulty obtaining a wedding cake from another source.

The CCA has twisted the newly-minted right to same-sex marriage into an imaginary right of same-sex couples to force others to promote their same-sex weddings. Worse, the CCA has elevated this supposed right above the constitutionally enumerated rights of free exercise of religion and free speech. Colorado may not compel citizens to forfeit those rights.

II. As applied in this case, Colorado's anti-discrimination law must satisfy strict scrutiny because it abridges the hybrid rights of speech and religion.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), this Court held

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[6] The Petition for a Writ of Certiorari refers to Phillips and Masterpiece Cakeshop collectively as "Phillips." Petition, at 4. For consistency, we shall do the same.,

[7] *See* Kristen O'Gorman Klein, *5 Wedding Cake Alternatives*, BridalGuide.com, https://goo.gl/4NfYnu.

that strict scrutiny need not be applied to laws of general application that incidentally infringe the free exercise of religion. But the Court made an exception for "hybrid" situations, namely "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Id.* at 881. The Court specifically identified as one of those exceptions "cases prohibiting compelled expression, decided exclusively upon free speech grounds, [that] have also involved freedom of religion." *Id.* at 882 (citing *Barnette* and *Wooley v. Maynard*, 430 U.S. 705 (1977)).

A maker of wedding cakes commonly wants to do more than bake a good-tasting cake. By words, designs, figurines, or simply choice of colors, the cake maker wants to create a festive mood, uplift spirits, and tell the newly-married couple and all others present that the occasion is truly joyous and blessed. Although not required or universal, in wedding receptions that feature cakes, the cake is often the central symbol, as wedding photographs commonly demonstrate.

Phillips considers his wedding cakes to be artistic expressions. The choice of the name "Masterpiece Cakeshop" demonstrates that he takes pride in his work and considers his cakes to be works of art. A "masterpiece" is "a work done with extraordinary skill; especially: a supreme intellectual or artistic achievement." *Merriam-Webster's Collegiate Dictionary* 764 (11th ed. 2009). But with same-sex weddings, Phillips cannot send a joyous and positive message because he believes same-sex marriages are not true marriage because they are forbidden by God.

The Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-601 *et seq.*, as applied in this case to compel speech contrary to sincerely held religious beliefs, implicates a hybrid exception under *Smith*. It must, therefore, satisfy strict scrutiny.

This Court has expressly recognized the importance of respecting the expressive rights of individuals who object to same sex marriage on religious grounds. Justice Kennedy stated for the majority in *Obergefell v. Hodges*:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.[8]

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[8] During oral argument in *Obergefell*, counsel gave differing answers on the question of religious freedom protection for those who object to same-sex marriage. Petitioners' Counsel Mary L. Bonauto insisted that free exercise protections will continue to apply (at least to clergy) (p. 23), but U.S. Solicitor General Donald B. Verrilli, Jr., was not so sure, saying "It is - it is going to be an issue." (p.38).

135 S. Ct. 2584, 2607 (2015).

Thus, to dismiss Phillips's moral objection to artistically designing a cake for a same sex wedding celebration contradicts the very case that supposedly granted same-sex couples the right to marry (albeit, after the event that gave rise to this litigation). If "those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned," 135 S. Ct. at 2607, then Jack Phillips must have the freedom to reject an order to create a cake for a same-sex wedding.

Furthermore, Phillips's demonstrated willingness to serve homosexuals and same-sex couples in any other capacity than making a custom wedding cake is compelling evidence that he is motivated by sincere religious conviction rather than animus toward homosexuals.

III. The Colorado Court of Appeals should have deferred to Phillips's conviction that being compelled to act in violation of his religious conscience created a substantial burden on his free exercise of religion.

The CCA said that forcing Phillips to furnish a cake for a same-sex wedding was not a major infringement on his free exercise of religion. However, that conclusion is at odds with clear precedent from this Court.

Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981), is most relevant to this case. Thomas, a Jehovah's Witness, worked for the Blaw-Knox Company in the sheet metal division. After that division closed, Thomas was transferred to a division that worked on tank turrets. When he refused to build tank turrets because doing so would violate his pacifist religious beliefs, Blaw-Knox terminated his employment. Thomas filed for unemployment compensation, but his claim was denied on the ground that his refusal to work constituted misconduct. Thomas argued that the denial violated the First Amendment because his alleged "misconduct" was based upon his pacifist religious beliefs. *Id.* at 710.

Like the CCA in this case, the Indiana Supreme Court, dividing 3-2, denied relief to Thomas, 391 N.E.2d 1127 (1979), stating that his belief was more a personal philosophical choice than a religious conviction: "A personal philosophical choice, rather than a religious choice, does not rise to the level of a first amendment claim." *Id.* at 1131.

Upon review, in an 8-1 decision, this Court reversed, stating:

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable,

> logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Thomas, 450 U.S. at 714.

The Indiana Supreme Court also noted that Thomas was willing to work at the foundry even though the foundry produced steel that would ultimately be used to make weapons, and considered this inconsistent with his stated objection to working on tank turrets. But as this Court observed:

> Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

Id. at 715.

Similarly, the undisputed facts of this case indicate that Phillips was willing to serve homosexuals and same-sex couples in nearly any other circumstance, but could not promote same-sex marriage by designing a cake for a same-sex wedding. In the same way that "Thomas drew a

line," *Id.*, Phillips has drawn a line, and it is not for the Colorado Court of Appeals or any other court to say that the line they "drew was an unreasonable one." *Id.*

The CCA does not deny that Phillips's objection to baking cakes for same-sex weddings is both religious and sincere. Rather, the CCA claims the law's burden on that religious belief is not substantial. However, the nature of a religious belief, and the degree to which a law burdens that belief, cannot be neatly separated. Phillips bases his beliefs and practices on the commands of God as revealed through the Holy Bible (*e.g.*, *Leviticus* 18:22; *Romans* 1:26-27). He believes he would sin against God if he were to provide a cake for a homosexual wedding. It is up to Jack Phillips, the artist himself, not the Court, to determine whether baking a cake for a same-sex wedding is a sin, and if so, how serious a sin.

When the CCA tells Phillips that the burden on his religious exercise may be cured by a sign on the door denying any endorsement of certain viewpoints, the court is essentially telling him how to practice his religion. But the State, as *Thomas* instructs, may not draw a line of conscience for Phillips. It has no authority to tell him that baking a cake for a same-sex wedding would not be a serious sin, and that his contrary belief is objectively false.

Telling Phillips that being forced to bake a wedding cake for a same-sex wedding is not a substantial burden on his religious convictions also comes close to defining his religious beliefs for him—deciding what doctrines and practices are essential to his faith. The

CCA's detailed analysis of Phillips's religious beliefs, for which it had neither the competence nor the jurisdiction to undertake, was a classic case of prohibited excessive entanglement with religion.

The importance or centrality of a certain practice to a religion may vary from one denomination to another and even among individuals within the same denomination. For example, the significance of Communion varies among denominations and individuals. Roman Catholics consider the bread and wine of Communion to be the transubstantiated Body and Blood of Jesus Christ. Lutherans consider Communion to be a means of grace involving the "real presence" of Christ in the sacrament. Others, such as Baptists, generally regard Communion to be only an ordinance and the bread and wine (or grape juice) to be only symbols. Analyzing these doctrines within the broader concept of faith might lead a court to consider Communion a "central" doctrine or practice for Catholics, possibly central for Lutherans, and not central for Baptists. But as this Court recognized in *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989): "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."

The question of centrality is closely related to the substantiality of the burden, because the more central the religious doctrine or practice is to the adherent, the more substantial is the burden imposed upon the adherent who is forced to violate that doctrine or practice. Suppose the government allowed churches to serve Communion but for health reasons

prohibited (or required) the use of wine instead of grape juice. Would that be a substantial burden? To answer that question, a court would have to analyze the nature of the practice of Communion, both generally and in that denomination as well as in the mind of the individual adherent, the history of that practice, the doctrinal reasons for the practice, and the consequences (in the view of church adherents) of violating that practice. Suppose, for example, one adherent believes a service without wine is not truly communion, and that one who dies without receiving true communion is in danger of eternal damnation. Does that make the denial of wine a substantial burden for that person, but an insubstantial burden for one who believes communion is less essential for salvation? That kind of inquiry is not within the "judicial ken," *Hernandez*, and certainly would foster a forbidden "'excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (quoting *Walz v. Tax Commission*, 397 U. S. 664, 674 (1974)).

United States v. Seeger, 380 U.S. 163 (1965), is also instructive, even though the issue was the meaning of the word "religious" under Sec. 6(j) of the Universal Military Training and Service Act rather than in the First Amendment. The statute provided an exemption from military service for those who were opposed to military service based on "religious training and belief." The Selective Service denied Seeger's claim for conscientious objector status, contending that his beliefs were not religious because the Act spoke of "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including]

essentially political, sociological, or philosophical views or a merely personal moral code." Seeger and his co-plaintiffs did not claim to believe in a "Supreme Being" although he did believe in a "Supreme Reality." But this Court concluded that

> Congress, in using the expression "Supreme Being," rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that, under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders, we cannot say that one is "in a relation to a Supreme Being" and the other is not.

Id. at 165-66.

Even though *Seeger* defined the term "religious" as used in a statute rather than in the First Amendment, the case demonstrates an inclination of this Court to defer substantially to a person or a religious group in determining the nature of their religious beliefs. The conscientious objector status that was provided to Seeger because of his objection to killing in warfare should also be provided to

Phillips because of what he perceives to be the endorsement or condoning of a sinful practice.

A claim of substantial burden could be so bizarre, contrived, and insincere as not to be entitled to First Amendment protection, but that is not the case here. *Thomas*, 450 U.S. at 715-16. Because no evidence indicates that Phillips is insincere, his claim that being forced to bake a cake for a same-sex wedding constitutes a substantial burden must be given substantial deference. As this Court stated in *United States v. Ballard*, 322 U.S. 78, 86-87 (1944):

> Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

What constitutes a substantial burden is highly individualized. In *Thomas*, the Indiana court had observed that another Jehovah's Witness who worked for the foundry had testified that he had no religious objection to working on tank turrets and had not been disciplined by the Jehovah's Witnesses for doing so. But this Court reversed, saying:

> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples

> about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. ... [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. at 715-16.

The same distinction applies in the case at hand. One person who holds religious objections to same-sex marriage may see no conflict between his beliefs and baking a cake for a same-sex wedding. Another equally sincere objector might not object to baking a cake so long as he was not required to attend the wedding and confirm that the cake is his work. Another may not object to baking the cake but would balk at putting the individualized trimmings on the cake that make it unique to the occasion. Still another might find all of these scenarios offensive. The Colorado Civil Rights Commission and the CCA have neither the jurisdiction nor the competence to tell Phillips what does or does not constitute a substantial burden upon his religious beliefs. By so

doing, they are acting in a manner that this Court prohibited in *Hernandez*, *Thomas*, and *Ballard*.

IV. The Colorado Court of Appeals' reliance on language about disclaimers in *Pruneyard Shopping Center* is entirely misplaced.

Pruneyard Shopping Center was required to allow a demonstration to take place on its property because of a provision of the California Constitution that was interpreted by the California Supreme Court to require private shopping centers to allow expressive activity on their premises. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).[9] That provision of the California Constitution does not apply in Colorado or any other state.

But even if the Colorado and California laws were identical, the facts are different. Pruneyard was not required to do anything or make anything for the demonstration; all Pruneyard had to do was allow the demonstration to take place. In contrast, Phillips is affirmatively required to create a custom wedding cake.

Furthermore, the owners of the Pruneyard Shopping Center were free to disclaim sponsorship of the message of the demonstrators by posting signs to that effect. *Pruneyard*, 447 U.S. at 87. Phillips does not have the same right, once the cake leaves his business premises. Placing a disclaimer on or beside

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[9] The *Pruneyard* rule contrasts with the normal rule that privately-owned shopping centers do not have to allow expressive activity on their premises. *See Hudgens v. NLRB*, 424 U.S. 507 (1976).

the wedding cake clearly is not an acceptable alternative, and a disclaimer inside the shop will not be observed by those who attend the wedding.

V. The government has no power to ban "offensive" speech except in certain limited categories not at issue in this case.

Responding to the allegation that other bakeries are permitted to refuse to bake cakes with anti-gay messages, the CCA noted the findings of the Colorado Division of Civil Rights that the refusal to inscribe a cake with an anti-gay message was permissible because those messages were "offensive." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo. App. 2015). But no court or government official has the authority to determine what messages are and are not offensive.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Barnette, 319 U.S. at 642.

Just as government cannot prescribe what is orthodox, so government cannot prescribe what is offensive, except for certain categories of speech such as obscenity, fighting words or true threats that are

not at issue in this case. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995).

VI. A wedding is an expressive event, and the Constitution forbids compelled expression.

In *Hurley*, gay rights groups sought the protection of a Massachusetts public accommodation law to march in the Boston St. Patrick's Day parade under their own banner. The Court held that forcing the parade organizers to include the gay rights group "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. The Court explained that, "like a composer, the Council selects the expressive units of the parade from potential participants." *Id.* at 574. And the choices of what messages to include and to exclude "is enough to invoke [the Council's] right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.* *Marsh v. State of Alabama*, 326 U.S. 501 (1946), made a similar point, holding that a private business could control the messages expressed on its property.

This case is the inverse of *Hurley*. Instead of the organizers of the same-sex wedding excluding Phillips from participating in that event, they are

using state anti-discrimination law to *force his participation*. Can someone who does not want to take part in a parade be forced to march in it?

The CCA seeks to sidestep this dilemma by arguing that creating the wedding cake was not expressive conduct at all, but only a simple commercial transaction. A wedding ceremony, however, is an inherently expressive activity. Even the most private wedding "speak" a message which, from start to finish, suggests that the love of the couple for each other is being communicated through a beautiful and wonderful ceremony and accompanying festivities. For this reason the couple invites guests to witness and partake in the celebration. Additionally, many weddings incorporate the venerable tradition in which the officiant poses the question whether any know of a reason why the couple should not be wed: "Let him now speak or else, hereafter forever hold his peace."[10]

For these reasons, an event more expressive than a wedding ceremony is difficult to imagine. The wedding cake is integral to that expression.

VII. The Colorado Court of Appeals incorrectly applied the "reasonable observer" test.

The CCA suggests that a reasonable observer would understand that Phillips's compliance is not a reflection of his own beliefs. However, there is no basis for a reasonable observer to come to that

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[10] *See* 1928 Book of Common Prayer, *The Form of Solemnization of Matrimony*, https://goo.gl/iA5ERV.

understanding. Furthermore, the Court has used the reasonable observer test in Establishment Clause cases, not Free Exercise or Free Speech cases. And the focus in those cases was on government speech and action, not private speech. *See, e.g., Capitol Square v. Pinette,* 515 U.S. 753, 765-66 (1993).

Most important, the question whether a reasonable observer would perceive the wedding cake as an endorsement of same-sex marriage is irrelevant for Free Exercise and Free Speech analysis; the question is whether it sends a message Phillips does not want to send, regardless of how the observer perceives it.

In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court held that a New Hampshire requirement that all motor vehicle license plates bear the slogan "Live Free or Die" violated the First Amendment rights of Maynard who swore that he found the slogan "morally, ethically, religiously and politically abhorrent." *Id.* at 713. The Court's conclusion did not depend on whether a reasonable observer would conclude from the license plate, as the dissenters argued, that Mr. Maynard did not endorse the message or that, as an alternative, he could mount a competing message next to the license plate. *Id.* at 719-22 (Rehnquist, J., dissenting).

Yet, the CCA argues, as did the dissenters in *Maynard*, that a reasonable observer would not view Phillips's creation of a custom wedding cake for a same-sex marriage as an endorsement of that ceremony. And, again paralleling the *Maynard* dissenters, the CCA states that Phillips could place a sign on the door that he is only complying with the

law.[11] This Court rejected those arguments in *Maynard* and should do so here.

VIII. The decision of the Colorado Court of Appeals violates the Involuntary Servitude Clause of the Thirteenth Amendment.

The Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

In 1873, this Court described this Amendment as the "grand yet simple declaration of the personal freedom of all the human race[.]" *The Slaughter-House Cases*, 83 U.S. 36, 69 (1873). "Viewed in historical context and in the tradition of American political thought, the amendment is an affirmation of the idea that liberty, in the most fundamental sense, consists in the right of individuals not to be interfered with in the exercise of their natural rights." Herman Belz, "Abolition of Slavery," in *The Heritage Guide to the Constitution* 380 (2005).

Early in the last century, Chief Justice Hughes stated for the Court: "The plain intention [of the Thirteenth Amendment] was ... to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's

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[11] Certainly allowing him to place a sign by the cake stating his views on same-sex marriage would not be an acceptable alternative.

benefit which is the essence of involuntary servitude." *Bailey v. State of Alabama*, 219 U.S. 219, 241 (1911).

In *United States v. Kozminski*, 487 U.S. 931 (1988), this Court provided an extensive discussion of the scope of the Thirteenth Amendment. After noting that the "primary purpose of the Amendment was to abolish the institution of African slavery," the Court stated that "the Amendment was not limited to that purpose; the phrase 'involuntary servitude' was intended to extend to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results." *Id.* at 942. About the exception for involuntary servitude as punishment for a crime, the Court stated: "The fact that the drafters felt it necessary to exclude this situation indicates that they thought involuntary servitude includes at least situations *in which the victim is compelled to work by law*." *Id.* (emphasis added).

Examining its past precedents, the Court held that involuntary servitude exists when "the victim had no available choice but to work or be subject to legal sanction." *Id.* at 943. The Court discussed three categories of exceptions to this rule: (1) involuntary servitude as punishment for a crime, (2) government compelling citizens to "perform certain civic duties" (such as jury service, military service, and roadwork); and (3) "'exceptional' cases well established in the common law at the time of the Thirteenth Amendment" such as the right of parents to their children or preventing sailors from abandoning ship. *Id.* at 943-44. But absent these exceptions, the Court

held that its precedents "clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion." *Id.* at 944.

In the *Slaughter-House Cases*, the Court rejected a claim by independent butchers in the City of New Orleans that a statute which in effect required them to close their shops and either work for major slaughterhouses or stop pursuing their trade, constituted involuntary servitude in violation of the Thirteenth Amendment. By a vote of 5-4, the majority declared that the grand purpose of the Thirteenth Amendment was to abolish African slavery and that to "endeavor to find in it a reference to servitudes which may have been attached to property in certain localities requires an effort, to say the least of it." *Id.* 69.

However, it appears that 115 years later, in the *Kozminski* case, the Court gave the Thirteenth Amendment a broader interpretation, applying the prohibition of involuntary servitude to anyone who is forced to work for another person.[12] In the case at hand, Phillips is forced to design a wedding cake for a same sex couple in violation of his religious and moral convictions or else face severe legal and financial penalties. *See Craig*, 370 P.3d at 279-83. The CCA held that Phillips could not decline to provide his services without suffering a legal

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[12] Also in contrast to the claim in *The Slaughter-House Cases*, the petitioners in this case are not complaining about a state-created monopoly. On the contrary, they are complaining that they are being compelled to perform labor for another against their will under threat of legal sanction.

sanction. This holding forced him to forsake his trade or to work against his will in violation of his religious and moral convictions. Per *Kozminski,* Phillips has been subjected to involuntary servitude.

IX. The State of Colorado has sent a "message of exclusion" to Masterpiece Cakeshop.

This Court has expressed concern that endorsing or coercing certain practices, or discouraging or prohibiting others, sends a "message of exclusion to all those who do not adhere to the favored beliefs." *Lee v. Weisman,* 505 U.S. 577, 606 (1992) (Blackmun, J., concurring) *See also Wallace v. Jaffree,* 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

In this case the State of Colorado has sent a "message of exclusion" to Jack Phillips, the owner of Masterpiece Cakeshop: he may not follow his religious beliefs concerning marriage, and, if he does, he will face official censorship and fines that will force him out of business. In effect, the State has told Phillips and all who share his beliefs that they must either abandon those beliefs or else be excluded from the occupation of making custom wedding cakes. This edict clearly tells them that "they are outsiders, not full members of the political community." *Jaffree,* 472 U.S. at 69 (O'Connor, J., concurring).

As Justice Alito predicted in *Obergefell,* that decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy," and "to stamp out every vestige of dissent." 135 S. Ct. at 2642 (Alito, J., dissenting). Justice Alito acknowledges that "the majority attempts, toward the end of its opinion,

to assure those who oppose same sex marriage that their rights of conscience will be protected." *Id.* However, he adds:

> We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

Id. at 2642-43.

Even before *Obergefell* was announced, the campaign of suppression had begun, subjecting those who hold traditional religious and moral beliefs to public scorn and official persecution. The intolerance of those who would commandeer Christians into the service of what they believe to be sin is well-reflected in the statement of Colorado Senator Pat Steadman: "Get thee to a nunnery and live there then. Go live a monastic life away from society." Quoted in Douglas Laycock, *Religious Liberty and the Culture Wars*, 14 Univ. Ill. L. Rev. 839, 871 (2014). When the law compels law-abiding citizens to submit to that which they perceive as immoral, it loses legitimacy. "When law and morality contradict each other, the citizen has the cruel alternative of either losing his moral sense or losing his respect for the law." Frederic Bastiat, *The Law* 11 (Cosimo Classics 2006) (1850). *See generally* D.A. Carson, *The Intolerance of Tolerance* (2013).

The Free Exercise Clause, designed to shield people of faith from state persecution, must be construed to protect the fortress of conscience against secular assault. In sum, "the free exercise of religion necessarily entails a right to conscientious objection exemptions from state mandates that seek to require believers to engage in sinful conduct." Nora O'Callaghan, *Lessons from Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 639 (2006).

Since *Obergefell*, the campaign against people of faith has intensified. This case is the tip of the iceberg, one of numerous such cases,[13] but the first to reach this Court for decision.

CONCLUSION

The Foundation urges this Court to stand by its assurances in *Obergefell* that the First Amendment rights of those who believe in traditional marriage will be protected, and that those whose consciences will not allow them to participate in same-sex weddings will not be sent a "message of exclusion" that they are now second-class citizens and unwelcome in American society.

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[13] Recently a Wisconsin Circuit Court ruled that a photographer had the right to refuse to photograph same-sex weddings, noting that her studio does not have a storefront. *See Amy Lynn Photography Studio, LLC v. City of Madison*, No. 17 CV 555 (Wis. Cir. Ct. March 7, 2017).

Respectfully submitted,

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